

Internal Revenue Service

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Department of the Treasury

Washington, DC 20224

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Person To Contact:

, ID No.

Telephone Number:

Refer Reply To:

CC:CORP:BO6

PLR-139967-09

Date:

October 14, 2009

LEGEND

Parent =

Seller =

Newco =

State A =

Date 1 =

Date 2 =

Date 3 =

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Dear :

This letter responds to a letter dated September 1, 2009 requesting a ruling under section 1504(a) of the Internal Revenue Code. The material information submitted in that request and in a supplemental letter dated October 9, 2009 is summarized below.

FACTS

Parent is a publicly traded corporation and is the common parent of an affiliated group of corporations that join in filing a consolidated Federal income tax return ("Parent Affiliated Group"). Seller is a domestic corporation that is unrelated to any member of Parent Affiliated Group. Seller currently owns interests in multiple projects

("Projects").

The Projects are owned indirectly through multiple tiers of entities including operating entities that directly own and operate the Projects ("Operating Entities").

A member of Parent Affiliated Group entered into a Letter of Intent on Date 1 with Seller providing for the purchase by Newco (described below) of an indirect interest in the Projects for an aggregate purchase price of approximately b ("Purchase Price") pursuant to a single purchase agreement ("Purchase Agreement"). The parties later agreed to an increase in the number of Projects underlying the transaction, along with an increase in the Purchase Price to approximately c.

In order to effect the proposed transaction, Seller formed a limited partnership ("LP") under the laws of State A that will hold indirect interests in the Projects. Newco will purchase a limited partnership interest and a general partnership interest in the LP (collectively, Newco's "interest" in the LP). A limited liability company wholly owned by Seller ("LLC") will hold the remaining interests in the LP. References to "Seller" herein include references to the LLC as applicable. A portion of the Purchase Price will be contributed by Newco to the LP and will be paid by the LP to Seller in consideration for Seller's undertakings in the Payment and Authority Agreement . The anticipated closing date for the LP investment ("Closing Date") is on or before Date 2.

Newco is a recently incorporated State A corporation. Newco is authorized to issue only a single class of stock, which is common stock. The shares of Newco common stock that are issued and outstanding at any time will be referred to as the "Newco Common Stock." On or prior to the Closing Date, one or more members of Parent Affiliated Group (acting directly or through a disregarded entity) will make a capital contribution to Newco equal to e% of the Purchase Price plus an additional amount necessary to pay transaction expenses, if any. Newco has not issued any options or other rights to purchase its stock. Newco will pay f% (100 minus e%) of the Purchase Price by delivering a promissory note to Seller ("Seller Financing Note") and the balance in cash.

The by-laws of Newco ("By-laws") provide for a board of directors ("Newco Board") consisting of three members. Newco's shareholders will elect all members of the Newco Board. The Newco certificate of incorporation ("Charter") and By-laws do not limit the powers of the Newco Board or the powers of the shareholders granted under State A law, except that the By-laws include guidelines ("Guidelines") that restrict the activities of Newco.

The Guidelines limit Newco's activities to the following: (a) acquiring, holding, and disposing of its LP interest, and making additional capital contributions or loans to the LP; (b) entering into a tax sharing agreement ("Tax Allocation Agreement") described below with Parent; (c) entering into the Seller Financing Note and related documentation ("Seller Financing Loan Documents") with Seller as lender; (d)

; (e) issuing new shares of stock for consideration or accepting additional capital contributions from stockholders, provided that the share issuances are not in breach of the Seller Financing Loan Documents; (f) entering into certain pledge and related agreements (Pledge and Security Agreement and Collateral Agency Agreement) and an Early Buy-Out Agreement (as described below) with Seller and other parties, and entering into operating agreements of entities owned by the LP; (g) investing proceeds from the LP, the Tax Allocation Agreement, the Payment and Authority Agreement, the Put Option Agreement, the Pledge and Security Agreement, and the Early Buy-Out Agreement in demand deposits, U.S. Treasury securities, debt obligations of or guaranteed by Parent, or equity in money market funds holding U.S. Treasury securities; (h) executing documents, exercising rights, fulfilling obligations and other activities to the extent necessary or helpful to carry out or facilitate the foregoing, including incurring ordinary course trade payables; and (i) making dividend or other distributions on Newco Common Stock, provided they are not made in breach of the Seller Financing Loan Documents. The Guidelines also provide that Newco shall not effect a dissolution, winding up, liquidation, consolidation or merger, or incur, create or assume any indebtedness or other liabilities in breach of the Seller Financing Loan Documents.

The By-laws may be amended by the Newco Board or Newco's shareholders but the Guidelines and the amendment provision in the By-laws may not be amended in breach of the Seller Financing Loan Documents. As discussed below, the Seller Financing Loan Documents will prohibit any change in the Guidelines without consent of Seller while the Seller Financing Note is outstanding.

The Charter and By-laws do not impose additional limitations on the ability of the Newco Board to declare and pay dividends beyond those imposed by State A law and the Seller Financing Loan Documents. The Seller Financing Loan Documents will allow Newco to pay dividends if all required debt service payments have been made and there are no events of default under the Seller Financing Loan Documents that have occurred and are continuing. It is not anticipated that dividends would be limited due to insolvency concerns as Newco is not expected to become insolvent.

Parent will enter into a Tax Allocation Agreement with Newco that will require Parent to make periodic payments to Newco for making available ordinary losses and whether or not used by the Parent Affiliated Group, and will require Parent to make payments to Newco for other tax benefits to the extent actually used by the Parent Affiliated Group. It is anticipated that Newco will use payments from Parent under the Tax Allocation Agreement to make debt service payments on the Seller Financing Note. As described below, the Tax Allocation Agreement will be pledged to Seller under the Seller Financing Loan Documents.

The parties intend to treat the LP as a partnership for Federal income tax purposes. Newco and Seller will enter into a Limited Partnership Agreement ("LP Agreement"). Under the LP Agreement, the LP will be a special purpose entity that indirectly owns interests in the Projects and only undertakes activities related to its investment in the Projects.

Newco's economic interest in the LP will be represented by a limited partnership interest. In addition, Newco will have a general partnership interest in the LP during an initial period ("Initial Period"). The Initial Period will be at least g months. The general partnership interest will give Newco certain management rights and a de minimis economic interest. Newco will be allocated h% of the operating profits, losses, gain or loss from capital transactions of the LP during the Initial Period and i% after the end of the Initial Period (or the Extension Period, if applicable). The LP agreement provides for an "Extension Period" to begin immediately following the Initial Period if Newco's return on its investment in the LP fails to meet certain conditions. Newco's LP allocation percentage will not change to i% until the end of the Extension Period (if any). Extension Period LP allocation percentages will be determined at the end of the Initial Period. Seller will hold all interests in the LP not held by Newco and will be allocated all items not allocated to Newco. Distributions of available net operating cash flow will be made in accordance with these percentages.

The LP Agreement will impose some restrictions on Newco's ability to transfer its interest in the LP. Without Seller's consent, Newco will not be able to transfer its interest in the LP (including a transfer of beneficial ownership without admitting the transferee as a partner) (1) to certain categories of persons who have business or other interests that conflict with those of Seller, (2) in a way that would cause a technical termination of the LP under section 708, (3) while there is a material breach by Newco of the Seller Financing Loan Documents, (4) in violation of certain legal restrictions, (5) such that its interest in the LP is divided among more than two persons that are not affiliates, and (6) if the transfer would cause the LP to have a new general partner other than Newco, or Seller (or any of their affiliates). Subject to the restrictions described in the preceding sentence (and any restrictions under the Seller Financing Loan Documents), Newco may transfer beneficial ownership of its interest in the LP to any person without admitting the transferee as a partner, so long as Newco is not in

material breach of the Seller Financing Loan Documents and the transferee has no right to exercise any of the rights and powers of a partner, or enforce the provisions of the LP Agreement, the Purchase Agreement, the Payment and Authority Agreement, the Early Buy-Out Agreement, the Put Option Agreement, or the Pledge and Security Agreement. A transferee may be admitted as a partner only with Seller's consent, but such consent may not be unreasonably withheld.

The LP Agreement will grant an option to Seller ("Buyback Option") to cause the LP to redeem Newco's interests in the LP during the Initial Period in the event the LP has suffered a significant reduction in anticipated tax benefits from the Projects.

The exercise price may be adjusted after the Buyback Option settlement date to account for certain adverse Internal Revenue Service ("IRS") adjustments ("Tax Detriments Guaranty") and any final tax information received after the settlement date.

If an entity indirectly owned by the LP realizes materially fewer tax benefits than originally projected, Seller will have the right under the LP Agreement to remove the LP's indirect interest in that entity and replace it with direct or indirect interests in new entities or increased interests in entities in which the LP already owns an indirect interest, subject to Newco's consent, not to be unreasonably withheld.

Under the LP Agreement, Newco will be granted the right to force a redemption of its interest in the LP ("Redemption Option"). The Redemption Option is exercisable during a k day period after the end of the Initial Period ("Initial Redemption Option Period"). Newco has a similar right to exercise the Redemption Option earlier upon the occurrence of certain events of default relating to Seller, the LP or certain entities owned directly by the LP. The LLC or its designee may in its discretion elect to purchase the interest directly in lieu of causing the LP to redeem the interest. Under the Put Option Agreement, Newco will be granted an option ("Put Option") to sell its limited partnership (but not its general partnership) interest in the LP to Seller in the event that (i) the LP fails to redeem the interest on exercise of the Redemption Option, (ii) there is a legal impediment to Newco exercising the Redemption Option or to the LP redeeming Newco's LP interest, or (iii) an event of bankruptcy occurs with respect to the LP between the date of exercise and the date of settlement with respect to one of the options in the transaction or an event of bankruptcy occurs with respect to Seller.

If Newco does not exercise its Redemption Option or the Put Option, Seller does not exercise the Buyback Option, and Newco's Shareholder does not exercise the Early

Buy-Out Option described below, the LP will indemnify Newco on an after-tax basis for losses of tax benefits in respect of the Initial Period resulting from an IRS audit (i) if there is a determination that the _____ losses actually produced by the Projects and flowing through to the LP do not flow through to Newco in accordance with its percentage interest in the LP; (ii) if certain Code sections apply to deny or decrease depreciation deductions or reduce the tax basis of the LP's property; (iii) if the _____ is not amortizable as expected; or (iv) if any judicial doctrine is applied to the transactions described herein to disallow some or all of the tax benefits ("Structural Guaranty"). In addition, if Shareholder exercises the Early Buy-Out Option and the exercise price was determined using the FMV Price (described below), the Structural Guaranty will require payments to be made to Newco or Shareholder for any losses of tax benefits after the settlement of the Early Buy-Out Option. The Structural Guaranty will not protect against losses of tax benefits attributable to certain circumstances including generally a change in law. Except after the settlement of the Early Buy-Out Option in the manner described above, the Structural Guaranty will not protect against underperformance by a lower-tier entity. Except after the settlement of the Early Buy-Out Option in the manner described above or in the case of clause (ii) of this paragraph, the Structural Guaranty will not protect against an IRS audit of a lower-tier entity.

Under the Payment and Authority Agreement, if the LP or the LLC does not have the funds to pay the Redemption Option exercise price, the Early Buy-Out Option exercise price, amounts due under the Tax Detriments Guaranty and the Structural Guaranty, post-settlement adjustments to the Buyback Option exercise price, or to cure capital contribution defaults under the LP Agreement ("Guaranteed Obligations"), then Seller will be obligated to advance the necessary funds. The Payment and Authority Agreement will not restrict Newco's rights to assign its interest in the LP. Newco may not assign the Payment and Authority Agreement without the consent of Seller unless Newco transfers to the same person its interest in the LP in compliance with the LP Agreement and the Seller Financing Loan Documents.

Under the Payment and Authority Agreement, Newco will delegate to Seller the right to exercise the rights Newco otherwise would have as a general partner of the LP so long as Seller or an affiliate is a partner in the LP, Newco is a general partner of the LP, and Seller is not in default of its Guaranteed Obligations or any of its obligations under the Put Option Agreement. The delegation will also terminate upon the occurrence of certain financial triggering events indicating a certain level of financial distress at Seller. Seller will have certain rights to restore delegation after an early termination by _____ curing a default, or demonstrating an ability to satisfy its Guaranteed Obligations.

Newco's direct shareholder ("Shareholder"), Seller and Newco will enter into an Early Buy-Out Agreement under which the LLC will grant to Shareholder an option ("Early Buy-Out Option") to cause the LLC (or its designee) to purchase 1% of the Newco Common Stock. Exercise of the Early Buy-Out Option will require Shareholder to give at least m months notice prior to the proposed settlement date ("Settlement Date"). After giving such notice, Shareholder may revoke the notice until a date that is n days after

delivery of the notice, except that a revocation of the notice will not preclude Shareholder from giving notice of exercise again at a later date. The first day on which notice of exercise may be given will be 0 months after the Closing Date. The last day on which notice of exercise may be given under the Early Buy-Out Agreement will be 0 months prior to the earliest date on which the Initial Period may end. If Newco Common Stock is transferred by Shareholder to other members of the Parent Affiliated Group, those members will succeed to the rights and obligations of Shareholder under the Early Buy-Out Agreement.

The exercise price for the Early Buy-Out Option will be an amount equal to the LP Amount plus the Other Assets Amount minus the Liability Amount, in each case calculated as of the Settlement Date. The Seller Financing Note will become immediately due and payable upon the successful settlement of the Early Buy-Out Option on the Settlement Date.

The “Other Assets Amount” is the sum of the amount of cash and cash equivalents held by Newco and the fair market value of any assets held by Newco other than cash, cash equivalents or the LP investment (treating as zero the value of any asset held by Newco (i) in violation of the Seller Financing Loan Documents or (ii) which constitutes a debt obligation of or a security issued by a member of the Parent Affiliated Group). The Liability Amount is the outstanding balance (principal plus accrued interest) of all liabilities of Newco, including any indebtedness secured by Newco stock or assets.

If Shareholder gives notice of exercise of the Early Buy-Out Option and does not revoke such notice, at any time prior to the Settlement Date, in lieu of purchasing 0 percent of the Newco Common Stock, Seller will have the right to purchase Newco’s LP interest or cause the LP to redeem Newco’s LP interest (“Interest Acquisition Election”) on the Settlement Date. Seller will pay a penalty for exercising the Interest Acquisition Election in the form of a reduced penalty to Shareholder for exercising the Early Buy-Out Option.

An accounting firm will provide an estimate of the exercise price prior to the anticipated Settlement Date. The price will be adjusted as needed following the Settlement Date to reflect updated tax information received after the Settlement Date; to reflect any payments due from Seller in connection with the Tax Detriments Guaranty, or in certain cases described above, the Structural Guaranty for the period through the

Settlement Date; and to ensure that all fair market value calculations reflect the facts in existence on the Settlement Date.

Under the “Pledge and Security Agreement,” the LP will provide Newco with a security interest in certain of its investments in lower-tier entities (and certain lower-tier entities will provide security interests in their investments in other lower-tier entities). The Pledge and Security Agreement protects Newco in the event of a bankruptcy or receivership of Seller, the LP or entities directly owned by the LP.

The Seller Financing Note will mature on Date 3. It will bear interest at a fixed rate, which will be payable quarterly. Principal will be payable according to an amortization schedule. Newco will have certain rights to prepay the Seller Financing Note in part before the end of the Initial Redemption Option Period and in whole following the end of the Initial Redemption Option Period. It may have limited rights to repay the Seller Financing Note in whole before the end of the Initial Redemption Option Period upon the occurrence of certain events (except generally a de minimis amount may not be prepaid). A prepayment in some circumstances will require payment of a penalty of t basis points of the principal balance that is prepaid. Seller may transfer the Seller Financing Note in whole but not in part.

Parent will provide a guarantee (“Parent Guarantee”) of Newco’s payment obligations under the Seller Financing Loan Documents. In addition, the Seller Financing Note will be secured by Newco’s interest in the LP and the Tax Allocation Agreement (“Collateral”). The Seller Financing Loan Documents will prohibit Newco from disposing of the Collateral without Seller’s consent while the Seller Financing Note is outstanding (other than dispositions through exercise of the Redemption Option or Put Option, the Buyback Option, or the Early Buy-Out Option if the Interest Acquisition Election is exercised). The Seller Financing Loan Documents will also prohibit more than u% of Newco Common Stock from being transferred or issued to persons other than members of the Parent Affiliated Group without Seller’s consent. After full repayment of the Seller Financing Note, the Collateral may be disposed of without limitation under the Seller Financing Loan Documents.

The Seller Financing Note will become immediately due and payable upon successful settlement of the Redemption Option, the Put Option, the Early Buy-Out Option, or the Buyback Option, or if certain events of default occur (including an assignment by Newco or Parent for the benefit of creditors and certain bankruptcy or insolvency events of Newco or Parent).

Assuming no events of default have occurred or are continuing, Newco will be allowed to make dividend payments to its shareholders in an amount equal to its legally available funds.

The Seller Financing Loan Documents will also include covenants that Newco will not engage in any dissolution, liquidation or consolidation or merger with or into any other business entity, except to the extent permitted; modify, amend, waive, breach or terminate the Guidelines, without obtaining the prior written consent of Seller (to be given in Seller's absolute and sole discretion); modify, amend, waive or terminate its organizational documents (other than the Guidelines) without obtaining the prior written consent of Seller, unless such action is taken in connection with the repayment in full of the Seller Financing Note, is expressly permitted, or is taken in accordance with the organizational documents and such action would not have a material adverse effect; amend the Tax Allocation Agreement except in limited circumstances; assign, transfer, or pledge the Tax Allocation Agreement or any rights or obligations thereunder without Seller's consent; permit an assignment of the rights or obligations of Parent under the Tax Allocation Agreement except in limited circumstances; create, incur or assume any debt other than ordinary course trade payables and operating expenses incurred in the ordinary course of Newco's business, except to the extent expressly permitted; or create any lien on any portion of the Collateral with limited exceptions.

It is assumed for the purposes of this ruling that, because of the rights and obligations Seller has under the Seller Financing Loan Documents, LP Agreement, Put Option Agreement and Payment and Authority Agreement, Newco will not be consolidated with Parent for financial accounting purposes during the period prior to the end of the Initial Redemption Option Period.

REPRESENTATIONS

Parent had made the following representations in connection with the transaction described above:

1. The Seller Financing Note is treated as indebtedness for Federal income tax purposes.
2. While particular terms and conditions vary based on negotiations and the particular requirements of the parties, with respect to secured loans made to finance equity investments in real property: (1) it is a conventional term for the loan agreement to prevent the borrower from disposing of the investment while it is collateral for the loan without the lender's consent, and (2) it is conventional for the loan to be made to a special purpose entity that holds the investment, and in such a case (x) for the charter or other governing documents of the borrower to limit the activities of the borrower to holding the financed investment and engaging in incidental activities and (y) for the loan agreement to prohibit changes in those documents without the lender's consent. You have provided us with excerpts from articles and other materials supporting this statement.
3. It is conventional for y investments in projects substantially similar to the Projects to be in the form of limited partnership interests or non-managing limited liability company interests, with control rights limited to consent or veto rights with respect to non-

routine actions proposed either by a developer or a sponsor, and rights to replace the sponsor or developer for cause.

You have provided us with excerpts from articles and other materials supporting this statement.

4. Parent does not anticipate that the Parent Affiliated Group will derive a Federal income tax benefit as a result of Newco being the member of the Parent Affiliated Group that purchases the LP interest and enters into the related transactions with Seller as compared with Parent being the purchaser of the LP interest.

5. Newco may derive a return from its investment in the LP

. Towards the end of the Initial Period, the Newco Board will evaluate the LP investment by reviewing the performance of the Operating Entities and the Projects, considering updated projections of future performance

, and then decide whether or not to exercise the Redemption Option.

The fair market value of the LP interest at the time of exercise of the Redemption Option would depend on a number of variables. These include the then current state of the market for projects substantially similar to the Projects and alternative investments (prices are not a fixed percentage of tax benefits but a negotiated amount), tax rates (deductions have a higher value if tax rates are higher), the performance of the Projects (if they do well, cash distributions may be higher than originally projected), and interest rates (the cost of funding the continuing investment would depend on then prevailing market rates).

6. The exercise price of the Early Buy-Out Option is based on a formula designed by the parties in a bona fide attempt to achieve a price that is less than or equal to the fair market value of the Newco Common Stock on the Settlement Date based on the facts in existence on such date.

RULING

Based solely on the information and representations submitted by Parent set forth above, and provided that there are no modifications to the terms of the Newco stock or contractual terms described above, including through arrangements not described above, so that the description is no longer accurate in all respects that are material to this ruling, we rule as follows:

The stock of Newco owned by Parent or other members of the Parent Affiliated Group will meet the 80% vote and value test of section 1504(a)(2) so long as Parent or other members of the Parent Affiliated Group collectively own (either directly or through disregarded entities) at least 80% of the Newco Common Stock.

CAVEATS

No opinion is expressed or implied about the tax treatment of any other aspect of any transaction or item discussed or referenced in this letter, or about the tax treatment of any condition existing at the time of, or effects resulting from, any transaction or item that is not specifically covered by the above ruling.

PROCEDURAL STATEMENTS

The ruling contained in this letter is based upon information and representations submitted by the taxpayer and accompanied by a penalties of perjury statement executed by an appropriate party. While this office has not verified any of the material submitted in support of the request for ruling, it is subject to verification on examination.

This ruling letter is directed only to the taxpayer requesting it. Section 6110(k)(3) provides that it may not be cited or used as precedent.

A copy of this letter must be attached to any income tax return to which it is relevant. Alternatively, if Parent files its returns electronically, this requirement may be satisfied by attaching a statement to the return that provides the date and control number of this letter ruling.

In accordance with the Power of Attorney on file with this office, a copy of this letter is being sent to your authorized representatives.

Sincerely,

Virginia S. Voorhees
Senior Technician Reviewer, Branch 6
Office of Associate Chief Counsel (Corporate)